1986

The State of Utah v. Russell G. Slowe, Sr. : Brief of Appellant

Utah Supreme Court

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BRIEF

DOCKET 1986 20070

IN THE SUPREME COURT OF THE STATE OF UTAH

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THE STATE OF UTAH,	:	
Plaintiff-Respondent,	:	APPELLANT'S BRIEF
v.	:	
RUSSELL G. SLOWE, SR.,	:	Supreme Court No. 20070
Defendant-Appellant.	:	

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Appeal from the final judgment of conviction of attempted theft, a violation of 76-6-408, Utah Code Annotated (1953) in the Second Judicial District Court of Weber County, State of Utah, the Honorable Douglas L. Cornaby presiding.

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STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Whether an affidavit for a search warrant, the text of which was prepared prior to the circumstances it describes, containing misstatements of fact, allegations of fact unknown to the affiant and at least one conclusion, and failing to allege more than inconclusive facts about the reliability of the confidential informant who was the source of the information and the reliability of the informant's information itself, is fatally defective, thereby mandating the suppression of all evidence obtained by execution of the warrant that issued therefrom.

2. Whether evidence introduced at trial on the issue of the value of the allegedly stolen merchandise was insufficient as a matter of law.

3. Whether comments prejudicial to Defendant made by the prosecutor during closing arguments constituted prosecutorial misconduct sufficient to entitle Defendant to a new trial.

4. Whether the trial court's failure to suppress Defendant's 1967 misdemeanor conviction for perjury constituted reversible error.

STATEMENT OF FACTS

On December 15, 1983 five (5) officers of the Ogden City Police Department, including Jeff M. Cottam, took part in a "reverse sting" operation. They planned to sell allegedly stolen

merchandise, to-wit, a diamond ring, to Defendant through a police informant John Gallegos, hereinafter referred to as "Gallegos." (R.193, 1-22)

Defendant's business, Crazy Horse Jewelry, is located on 2470 Washington Boulevard in Ogden, on the east side of Washington Boulevard diagonally north from the Ogden Municipal Building. Defendant's business and the Municipal Building are quite close to each other but are separated by 25th Street.

As part of the operation, Cottam and Det. Greiner ". . . were in his undercover van parked on the southwest corner of 25th Street and Washington;" Detectives Hall and Garrett were on the east side of the street near Defendant's place of business and the 5th officer, Detective Shorten, was in the Narcotics Bureau Office in the Municipal Building. (R.193, 25 through R.194, 11) Gallegos was outfitted with a transmitter as well as with a micro-cassette recorder, the purpose of both of which was to memorialize the anticipated incriminating conversation between Gallegos and Defendant. (R.194, 12 through R.195, 5) Detective Greiner was supposedly monitoring the conversation by means of the transmitter.

Cottam saw Gallegos enter Defendant's business and then leave Defendant's business after the conversation, but could not see what happened inside between Gallegos' entry and exit.

(R.196, 22 through R.197, 7) Neither did Cottam know what the other detectives, Hall and Garrett, were able to see, if anything. (R.197, 14-16)

Through the microphone Gallegos was wearing Cottam and Det. Greiner heard the first part of the conversation between Defendant and Gallegos, but not the entire conversation. (R.195, 12 through R.196, 13) A transcript of the alleged conversation was prepared by the State. (R.50, Exhibit 4-D)

The conversation between Defendant and Gallegos lasted 2½ minutes, (R.199, 14-17) after which Gallegos came out of Defendant's business, back into view. Gallegos gave Cottam and the other detectives a pre-arranged hand signal to signal "whether or not a sale had been made or not." (R.200, 24 through R.201, 9) Cottam then left the van he had occupied with Detective Hall during the operation and met Gallegos about 30 seconds after Gallegos left Defendant's business (R.201, 21-23) at the north ground level doors of the Ogden Municipal Building and asked Gallegos ". . . if everything had gone as planned, if it had gone down exactly as we had set it up." (R.201, 12-14)

Gallegos ". . . says yes, he pulled two twenty dollar bills out of his pocket, at which time Detective Shorten took [Gallegos] into the office with the bills and searched him." (R.201, 14-16) The entire conversation between Cottam and Gallegos took not more than 15 seconds. (R.202, 5-7)

Cottam immediately went to the magistrate, Judge Ziegler, in the Ogden Municipal Building (R.202, 9-13 and R.203, 7-11) with an affidavit to apply for a search warrant. The "facts" alleged in the affidavit were typed in prior to the transaction itself. (R.204, 10-15 and R.204, 25 through R.205, 9)

The search warrant (R.5) issued and officers searched Defendant's business, during which they found the ring allegedly taken into Defendant's business by Gallegos, and upon which this action was based.

SUMMARY OF ARGUMENT

1. The affidavit executed by Detective Jeff M. Cottam in support of his application for a search warrant contained material misstatements of "facts;" alleges "facts" unknown to affiant at the time the search warrant was applied for; contained at least one conclusion; and was generally insufficient to allow the magistrate to find probable cause. Furthermore, the affidavit fails to adequately establish the credibility of the State's confidential informant and the information he gave.

2. The evidence presented at trial relating to the value of the allegedly stolen merchandise was insufficient to establish such value. The State's witness did not establish his expertise to give an opinion on the market value of the ring; and failed to establish its value on the date of the purchase by Defendant.

3. The prosecutor made inappropriate comments about Defendant during closing arguments which tainted the proceedings and requires the reversal of Defendant's conviction.

4. The trial court wrongfully refused to suppress a 1967 misdemeanor conviction of Defendant for perjury, which precluded Defendant from testifying in his own behalf and which resulted in prejudice to Defendant sufficient to overturn his conviction.

ARGUMENT

I

THE AFFIDAVIT UPON WHICH THE MAGISTRATE RELIED TO ISSUE ITS SEARCH WARRANT OF DECEMBER 15, 1983 IS FATALLY DEFECTIVE, MANDATING THE SUPPRESSION OF ALL EVIDENCE OBTAINED AS A RESULT OF THE EXECUTION OF SAID SEARCH WARRANT

1. Applicable Utah statutory authority relating to the issuance of a search warrant.

Title 77, Chapter 23, Utah Code Annotated (1953), hereafter "UCA" provides generally for the issuance of a search warrant as follows:

> Property or evidence may be seized pursuant to a search warrant if there is probable cause to believe that it (1) was unlawfully acquired or is unlawfully possessed; . . .

The following part, 77-23-3(1), UCA, specifies the conditions pertinent to this action which must exist prior to the issuance of such a search warrant as follows:

> (1) a search warrant shall not issue except upon probable cause supported by oath or affirmation particularly describing the person or place to be searched and the person, property or evidence to be seized.

Further mandates relating to the "mechanics" of obtaining a search warrant are found in 77-23-4, UCA, Insofar as that statute relates to this action it provides as follows:

> All evidence to be considered by a magistrate in the issuance of a search warrant shall be given on oath and either reduced to writing or recorded verbatim. . . .

Two other statutes define when and under what conditions evidence obtained during the execution of a search warrant shall be suppressed. Rule 12, Utah Rules of Criminal Procedure, hereafter URCrP, codified as 77-35-12, UCA, provides as follows:

> (g)(1) In any motion concerning the admissibility of evidence or the suppression of evidence pursuant to this section or at trial, upon grounds of unlawful search and seizure, the suppression of evidence shall not be granted unless the court finds the violation upon which it is based to be both a substantial violation and not committed in good faith. The court shall set forth its reasons for such finding.
> (2) An unlawful search or seizure shall in all cases be deemed substantial if one or more of the following is established by the defendant or applicant by a preponderance of the evidence:
> (i) The violation was grossly negligent, willful, malicious, shocking to the conscience of the court or was a result of the practice of the law enforcement agency pursuant to a general order of that agency;

(ii) The violation was intended only to harass without legitimate law enforcement purposes.
(3) In determining whether a peace officer was acting in good faith under this section, the court shall consider, in addition to any other relevant factors, some or all of the following:
(i) The extent of deviation from legal search and seizure standards; (ii) The extent to which exclusion will tend to deter future violations of search and seizure standards; (iii) Whether or not the officer was proceeding by way of a search warrant, arrest warrant, or relying on previous specific directions of a magistrate or prosecutor; or (iv) The extent to which privacy was invaded.
(4) If the defendant or applicant establishes that the search or seizure was unlawful and substantial by a preponderance of the evidence, the peace officer or governmental agency must then, by a preponderance of the evidence, prove the good faith actions of the officer.

The foregoing, added to Rule 12 in 1982, was supplemented by the legislature, also in 1982, by 77-23-12, UCA, as follows:

> Pursuant to the standards described in section 77-35-12(g) property or evidence seized pursuant to a search warrant shall not be suppressed at a motion, trial, or other proceeding unless the unlawful conduct of the peace officer is shown to be substantial. Any unlawful search or seizure shall be considered substantial and in bad faith if the warrant was obtained with malicious purpose and without probable cause or was executed maliciously and willfully beyond the authority of the warrant or with unnecessary severity.

2. The affidavit contains material misstatements of fact which must be stricken and cannot be relied upon to support the issuance of a search warrant.

The affidavit in support of the search warrant (R.3 and 4) contains the following allegations as "facts establishing the grounds for issuance of a search warrant:"

> On 12-15-83, police agent John Gallegos entered the business of Crazy Horse Jewelry, 2470 Washington, and sold the above-listed ring to Russell Slowe, Sr. At the time of the transaction, Slowe was told by John Gallegos that the ring is stolen and that he needed some quick cash. Slowe purchased the ring, believing it was stolen, and the ring is currently in the business at this time. These acts were recorded on tape and observed by affiant and other police officers nearby.

On the second page of the affidavit, (R.4) Cottam stated under the blank reserved for corroborative evidence the following:

> Police officers recorded the conversation by use of a tape recorder and had constant view of the store and on-sight view of our informant.

It is Defendant's contention that the trial court erred in failing to suppress all evidence obtained by the State in execution of its search warrant on December 15, 1983 on the basis that the affidavit executed by Detective Jeff M. Cottam contained (1) key allegations of "facts" which were actually unknown to the affiant; (2) that at least one material statement in the

affidavit contained a conclusion rather than a fact as required by statute; and (3) that other material statements in the affidavit alleged "facts" which did not actually occur.

During the suppression hearing held on April 30, 1984, Cottam provided under oath certain pertinent facts which are discussed, where appropriate, as they deviate from and elucidate the allegations of the affidavit:

POINT I: The affidavit contains substantial factual errors. The affidavit itself states ". . . Slowe was told by John Gallegos that the ring was stolen and that he needed some quick cash." This "information" was not only unknown to Cottam at the time he executed the affidavit, but is factually erroneous for the following reasons:

1. In the first place, Cottam was able only to see Gallegos arrive at Defendant's place of business and leave, (R.196, 24-25) but could not see what was going on inside Defendant's business during the transaction. (R.196, 25 through R.197, 1)

2. Secondly, although Cottam and Detective Greiner supposedly had the capability, through the transmitter, to actually hear the conversation between Defendant and Gallegos, (R.195, 14-15) Cottam said he only heard ". . . [Gallegos] greet Mr. Slowe when he came in the business, and inform him that he

had a ring, a stolen ring he'd like to show him," (R.196, 3-7) which, according to the State's transcript of the conversation never occurred. Not only was the word "stolen" never used, but also Gallegos never did tell Defendant that Gallegos needed "quick cash." (R.50, Exhibit 4-D)

3. Neither could Cottam have acquired hearsay information from Gallegos or the other officers prior to executing the affidavit. Gallegos, after a 2½ minute conversation with Defendant, (R.199, 17) came out of Defendant's business and gave Cottam and others a pre-arranged hand signal ". . . to be shown as to whether or not a sale had been made or not." (R.200, 24 through R.201, 1) Cottam described what happened next as follows:

> I then -- I then left the van, met Mr. Gallegos at the north ground level doors, asked him if everything had gone as we had planned, if it had gone down exactly as we had set it up. He says yes, he pulled two twenty dollar bills out of his pocket, at which time detective Shorten took him into the office with the bills and searched him. (R.201, 11-16)

The conversation between Cottam and Gallegos described in the next preceding paragraph took no more than 15 seconds. (R.202, 7) In any event, Cottam did not put in the affidavit for the search warrant anything that Gallegos may have told Cottam after the transaction and prior to the issuance of the search warrant (R.210, 11-14) and Cottam further admitted that no

information was given to the magistrate by him other than the information contained in the affidavit itself. (R.210, 19-24) In fact, the affidavit used by Cottam was typed prior to the conversation between Gallegos and Defendant, precluding the possibility that any such evidence from Gallegos was used. (R.204, 12-13)

POINT II: The affiant Jeff Cottam alleged "facts" which were unknown to him at the time the affidavit was executed. The last sentence of the "facts" alleges that [t]hese acts were recorded on tape and observed by affiant and other police officers nearby." R.206, 5-7) This is completely without foundation as far as Cottam was concerned as is set forth hereafter:

1. Not only did Cottam **not actually see** the alleged sale (R.206, 18; and R.208, 1-7) and did **not actually hear** the transaction until after he listened to the tape (R.206, 25 through R.207, 8) which was after the warrant issued, (R.207, 6-8) but also did not know and was not told by either of the other detectives, i.e., Hall or Garrett, what they saw, if anything. (R.197, 14-16; and R.209, 6-10)

2. Furthermore, Cottam did not know if the officers in the

Narcotics Bureau Office actually recorded the transaction, (R.198, 3-6) although again Cottam's allegations in the affidavit state otherwise.

POINT III: The information alleged in the affidavit as "corroborative" was unknown to affiant at the time the affidavit was executed. The supposed "corroborative" evidence on page 2 of the affidavit, i.e., "Police officers recorded the conversation by use of a tape recorder and had constant view of the store and on-sight[sic] view of our informant," suffers from the same deficiencies as the initial "facts" in support of the search warrant which are discussed above. Cottam had no information whatsoever that the conversation had been recorded inasmuch as he did not listen to the recording of the conversation until after the execution of the search warrant by the magistrate and did not know what, if anything, the other officers were able to observe.

POINT IV: The affidavit contains a material conclusion which cannot be considered by the magistrate in issuing a search warrant. The allegation that Defendant purchased the ring, "believing it was stolen," is likewise erroneous and a misstatement of fact which constitutes no more than a conclusion on the part of Cottam which does not comply with the requirements of the Utah Code set forth above and as such cannot be considered

by the Court. In Allen v. Lindbeck, 97 Utah 471, 93 P.2d 920 (1939) reflected this position at 922 as follows, citing an Idaho case as authority:

> Under the great weight of authority of both state and federal courts, a search warrant issued upon information and belief, unsupported by facts submitted to the magistrate, and **based upon the conclusions of the affiant rather than the facts,** is illegal, and a search conducted thereunder is unlawful and in violation of the constitutional provisions with relation to searches and seizures. [emphasis added]

POINT V: The infirmities of the affidavit render it **insufficient to support the issuance of a search warrant.** The magistrate is of course confined to the four corners of the affidavit in determining whether or not the same in sufficient. People v. Jackson, Colorado, 543 P.2d 705 (1975); People v. Brethauer, Colorado, 482 P.2d 369 (1971); and State v. Treadway, 28 Utah 2d 160, 499 P.2d 846 (1972)

Defendant attacks this affidavit with full knowledge that the affidavit is to be given a practical, common sense and realistic appraisal by this court. U.S. v. Ventresca, 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965) Furthermore, Defendant recognizes that an affidavit supporting the issuance of a search warrant may be based upon hearsay, ". . . providing there is a showing of underlying circumstances justifying a conclusion of the informant's reliability and credibility, . . ." State v.

Fort, Utah, 572 P.2d 1387, 1389 (1977) See also Allen v. Lindbeck, 97 Utah 471, 93 P.2d 920 (1939) and State v. Treadway, 28 Utah 2d 160, 499 P.2d 846 (1972)

In People v. Malone, Colo., 485 P.2d 499 (1971) the court held at 500 that false or erroneous factual statements in an affidavit for a search warrant must be stricken and could not be considered in the determination of whether or not the affidavit was sufficient to support the issuance of a search warrant. However, the court also conceded that the remaining allegations could be considered, if found sufficient by themselves, to support the issuance of a search warrant.

However, with regard to affidavits containing misstatements and erroneous statements, it has also been found that where a misstatement is material to a showing of probable cause, that misstatement will invalidate the entire affidavit. Schmid v. State, Alaska, 615 P.2d 565 (1980) In the Schmid case, the court stated that a fact was "material" for purposes of a search warrant affidavit

> ". . . if omission would make affidavit substantially misleading and, on review under statute authorizing motion to suppress, facts must be deemed material for such purpose if, because of their inherent probative force, there is substantial possibility they would have altered reasonable magistrate's probable cause determination." West's Ann.Const.Art 1, Section 13; West's Ann.Pen.Code, Sections 1538.5-1540.

There is further authority that in the event of a material misstatement, the warrant shall be voided and the fruits of the search occasioned thereby will be suppressed. State v. Larson, Wash.App., 613 P.2d 542 (1980)

Certainly the erroneous allegations and statements in the affidavit under scrutiny by this Court are material to the sufficiency of the affidavit, and whether this Court applies the principles of Schmid and Larson or of Malone, the result must be the same. The affiant's statements in the affidavit of what was said at the time of the conversation between Defendant and Gallegos were inaccurate; Cottam did not even really know Defendant had purchased the ring, because Gallegos only said "yes" to Cottam's question ". . . if it had gone down exactly as we had set it up," which was itself a distortion of what actually happened; Cottam's statement that the acts were recorded on tape and observed by other police officers was not true; and the corroborative information consisted of "facts" unknown to Cottam; and the statements regarding the alleged reliability of the informant and the information received from him is materially lacking. For the foregoing reasons this Court should nullify the search warrant of December 15, 1983 and suppress the fruits of said search warrant.

3. **The affidavit fails to show underlying facts and circumstances sufficient to show probable cause and fails to establish the credibility of the State's confidential informant.**

Page 2 of the affidavit provides a blank space reserved for the affiant's statement why the affiant considers the information received from the confidential informant reliable. Although Gallegos was not identified as a confidential informant per se, Cottam did state the following relative to his reliability as a confidential informant:

> Gallegos has assisted police officers on prior occasions, resulting in the clearance of more than 25 burglaries, and several felony arrests and convictions.

Information from a reliable informant may be relied upon to show probable cause to justify the issuance of a warrant, as long as the information meets certain tests. In Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964) and Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969), the United States Supreme Court mandated as minimum requirements (1) that the applicant set forth in the affidavit "underlying circumstances" sufficient to allow the magistrate to discern the validity of the informant's information and (2) that the affiant specify why he claims the informant to be reliable and his information credible. The two-pronged test of Aguilar and Spinelli has, however, recently been abandoned by the United

States Supreme Court in favor of a more comprehensive test, the adoption of which the Court, in Illinois v.Gates, _____U.S._____, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) explained (103 S.Ct. at 2332) as follows:

> [W]e conclude that it is wiser to abandon the "two-pronged test" established by our decisions in Aguilar and Spinelli. In its place we reaffirm the totality of the circumstances analysis that traditionally has informed probable cause determinations. The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

This Court has apparently taken the position, however, that Aguilar-Spinelli may still be viable. In State v. Bailey, Utah, 675 P.2d 1203, 1205 (1984) this Court stated:

> However, even under this [Illinois v. Gates] standard, compliance with the Aguilar-Spinelli guidelines may be necessary to make a sufficient basis for probable cause. Depending on the circumstances, a showing of the basis of knowledge and veracity or reliability of the person providing the information for a warrant may well be necessary to establish with a "fair probability" that the evidence sought actually exists and can be found where the informant states.

The Aguilar-Spinelli requirements are discussed in People v. Brethauer, Colo., 482 P.2d 369 (1971) and in Schmid v. State, Alaska, 615 P.2d 565 (1980), both of which are cited above and have been recognized by this Court in State v. Treadway, 28 Utah 2d 160, 499 P.2d 846 (1972); State v. Fort, Utah, 572 P.2d 1387 (1977); State v. Romero, Utah, 660 P.2d 715 (1983); and State v. Jordan, Utah, 665 P.2d 1280 (1983) In Brethauer, the affidavit contained the allegation that the affiant upon oath, ". . . has reason to believe . . ." and went on to describe several places where contraband drugs and related parphernalia were supposedly located. The affidavit further stated:

> The facts upon which this affidavit is based are as follows: That an informer, known to the affiant to be reliable, based on past information supplied by the informer which has proved to be accurate has told the affiant that approximately 50 capsuls [sic] containing L.S.D. and at least two ounces of marijuana are at these premises. The informer has on two occassions [sic] purchased L.S.D. and S.T.P. within the past five days. These capsuls [sic] were delivered to the Weld County Sheriff's Office and were tested and did contain L.S.D. and S.T.P. At the time of purchase the informer saw other capsuls [sic] containing L.S.D. and S.T.P. and the party making the sale said he had two ounces of marijuana. The party also said he was going to obtain 1100 additional capsuls [sic] of L.S.D. and two kilograms of marijuana and offered to sell to the informer one kilogram of marijuana. The informer is to make the purchase today. The informer also saw instruments for use in smoking marijuana on the premises.

The court in Brethauer found the affidavit fatally defective and ordered the information found pursuant to the search warrant to be suppressed for six (6) different reasons, discussed at 482 P.2d 371, two (2) of which apply to the facts of this case. At 371 the court stated:

> 1. The reliability of the informer is not established, and no basis is set forth to establish the source of this information.
>
> . . .
>
> 3. The affidavit does not set forth whether the information obtained by the informer was from another person or through the informer's own observations.
>
> . . .

With regard to the first requirement of Aguilar and Spinelli, the court in Brethauer reasoned the magistrate did not have sufficient information to perform his function and made the following observation at 373:

> Before the issuing magistrate can properly perform his official function he must be apprised of the underlying facts and circumstances which show that there is probable cause to believe that proper grounds for the issuance of the warrant exist. Mere affirmance of the belief or suspicion on the officer's part is not enough. To hold otherwise would attach controlling significance to the officer's belief rather than to the magistrate's judicial determination. [citations omitted]

POINT I: The affidavit does not fill the first requirement of the Aguilar-Spinelli test. The affidavit in this case is inadequate for the same reason, i.e., it does not comply with the

first test of Aguilar and Spinelli. The "facts establishing grounds for issuance of a search warrant," as discussed above, are not only deficient in that they fail to demonstrate ". . . that the informant obtained the information in a reliable manner." Schmid v. State, Alaska, 615 P.2d at 574. There are no "facts and circumstances" in the affidavit which show the facts themselves to be reliable, and even the bulk of the allegations that are found in the affidavit is erroneous, as discussed in section 2 above. The affidavit simply does not comply even with the first requirement of Aguilar and Spinelli

POINT II: The affidavit likewise fails to fill the second requirement of the Aguilar-Spinelli test. The Brethauer court also found that the affidavit before it failed to comply with the second requirement of Aguilar and Spinelli. At 373 the court explained:

> . . . we have declared that an affidavit does not establish the credibility of an informant by merely stating that the informant is known to be reliable. . . . Nor does an affidavit establish the credibility of an informant by merely stating that the informant is known to be reliable based on past information supplied by the informer which has proved to be accurate.

In the affidavit before this Court there is no allegation whatsoever regarding the validity or accuracy of Gallegos' previous information to the police and there is no allegation stating where the affiant acquired the information, such as it

was, about Gallegos. The statement that Gallegos has helped the police in the past and that this resulted in the "clearance of more than 25 burglaries, and several felony arrests and convictions" does not even come close to filling the second prong of the Aguilar and Spinelli test as reflected in the Brethauer case. In fact, the Brethauer affidavit stricken by that court was clearly more complete than the affidavit in this case.

This Court should regard Gallegos' "information" with a jaundiced eye and subject such information to stricter scrutiny than a "regular" citizen informant by virtue of the fact that Gallegos is a convicted felon. (R.409, 1-6) In the affidavit itself Gallegos is identified only as a "police agent," and it seems reasonable to require the applicant to make the magistrate aware of Gallegos' record, since it is a fact or circumstance which relates directly to the informant's reliability--or lack thereof. This Court, in State v. Treadway, Utah, 499 P.2d 160 (1972) recognized a difference between the motivation of a named citizen informant and an unnamed police informant. Although Gallegos in this case was named, he may have been motivated by circumstances discussed in Treadway at 848 and for that reason this Court should apply the same principle here.

POINT III: The affidavit is also deficient under the Illinois v. Gates test. Neither does the affidavit comply with the minimum requirements of Illinois v. Gates, supra. In fact if the Court uses that test instead of Aguilar-Spinelli, the affidavit may well be even more deficient. Applying the "totality of circumstances" test of Gates, there continues to be a substantial dearth of "circumstances" from which probable cause may be distilled. The test of Gates does not erase the erroneous statements made in the "fact" allegations. (R.3) Neither does it render the supposed "corroborative" facts (R.4), themselves untrue, more true. Neither does it create validity in the allegations regarding the confidential informant's reliability (R.4) or the trusworthiness of what he supposedly said. In sum, the affidavit is unconstitutionally deficient no matter what test is applied to it, and the warrant which issued therefrom cannot stand.

II

THE EVIDENCE INTRODUCED AT TRIAL WAS INSUFFICIENT AS A MATTER OF LAW TO PROVE THE VALUE OF THE PROPERTY ALLEGEDLY RECEIVED BY DEFENDANT

Defendant was charged with attempted theft, a 3d degree felony, in violation of 75-6-408, UCA, as follows:

> Said defendant did attempt to receive, retain or dispose of the property of another, to-wit: a ring of a value in excess of

> $1,000.00, knowing that the property had been stolen or believing that it probably had been stolen, with a purpose to deprive the owner thereof.

By virtue of 76-6-412, UCA, the substantive offense is a second degree felony if, as alleged here, the stolen property has a value exceeding $1,000 and 76-4-102, UCA, provides that an attempt to commit a 2d degree felony is itself a 3d degree felony. In any event the value of the allegedly stolen merchandise is an absolutely critical element of the State's case. If the State has failed to prove the value of the ring exceeded $1,000, as Defendant alleges, Defendant can be guilty only of a Class A misdemeanor, assuming the State has successfully proved the value to exceed $250.00 (UCA 76-6-412)

This Court has established clear standards for the review on appeal of the sufficiency of evidence received on the trial level. In State v. Petree, Utah, 659 P.2d 443 (1983) this Court stated at 444-445 as follows:

> [W]e review the evidence and all inferences which may reasonably drawn from it in the light most favorable to the verdict of the jury. We reverse a jury conviction for insufficient evidence only when the evidence, so viewed, is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted [citations omitted]
>
> . . .
>
> The fabric of evidence against the defendant must cover the gap between the presumption of innocence and the proof of guilt. In

> fulfillment of its duty to review the evidence from all inferences which may be reasonably drawn from it in the light most favorable to the verdict, the reviewing court will stretch the evidentiary fabric as far as it will go. But this does not mean that the court can take a speculative leap across a remaining gap in order to sustain a verdict. The evidence, stretched to its utmost limits, must be sufficient to prove the defendant guilty beyond a reasonable doubt. [citations omitted] See also State v. Watson, Utah, 684 P.2d 39 (1984); State v. Johnson, Utah, 663 P.2d 48 (1983); and State v. Royball, Utah, 689 P.2d 1338 (1984)

This Court has held that "value" of property allegedly stolen, for purposes of 76-6-412, UCA, as reflected in State v. Logan, Utah, 563 P.2d 811 (1977) is as follows:

> . . . its fair . . . market value at the time and place where the alleged crime was committed.

The jury instruction given in this case on the issue of value was as follows:

> When the value of property alleged to have been taken by theft must be determined, the market value at the time and in the locality of the theft shall be the test. That value is the highest price, estimated in terms of money, for which the property would have sold in the open market at the time and in that locality, if the owner was desirous of selling, but under no urgent necessity of doing so, and if the buyer was desirous of buying but under no urgent necessity of so doing, and if the seller had a reasonable time within which to find a purchaser, and the buyer had knowledge of the character of the property and of the uses to which it might be put. (R.76)

In view of the foregoing requirements, the State at trial was obligated to prove several elements relative to the issue of value, to-wit: (1) the fair market value of the ring; (2) on the used jewelry market; (3) on December 15, 1983; (4) in Ogden, Utah or the general market area of which Ogden was a part.

The State's sole witness on the element of value was Richard West, owner of West Jewelers in Ogden, Utah and a Certified Gemologist. (R.385, 1 through R.386, 2) It is Defendant's contention that West failed to provide sufficient competent evidence on value from which a jury could reasonably have concluded that the fair market value of the ring was more than $1,000.00 in the relevant market on the date of the alleged offense.

Relative to the issue of fair market value West first failed to provide sufficient evidence to show his competency to give an opinion on value. He stated he dealt in gold and diamonds, but ". . . on a retail basis---I buy them from our suppliers and retail them to the consuming public." (R.388, 6-12) When asked about his familiarity with ". . . used jewelry markets . . ." (R.393, 7-8) West responded:

> In the process of business, we are called upon many, many times to offer trade-in allowances for people on their diamond rings to apply to other purchases of diamond rings.

> Just the fact that you are appraising for insurance purposes as well as estate purposes, those are all used pieces of merchandise for that purpose.
>
> So, **in the appraisal for trade-in allowance we do the same thing that I have done here** as I mentioned to you for the customer's diamonds and offer that value in trade against another one that is used. That's what they could get for that.
>
> Now, if they go out on the market to buy it, . . . or to sell it, you go back to your original definition where they are defined as a willing buyer and are willing, therefore, to sell it at their agreement. I have a lot of people come in asking for an appraisal for that purpose because they want to sell their diamonds. This appraisal will give them an estimated replacement value from which they can work or bargain with someone to sell. [Emphasis added]
>
> . . .

Counsel for Defendant objected to the testimony to follow on value (R.394, 20-25) with the objection overruled, at which time the Court stated that "[Mr. West] understands the used market in Weber County" (R.395, 1-3) **even though West had never been asked and had never stated he was familiar with the used jewelry market in Ogden, much less Weber County, Utah!** In fact, West never gave any testimony thereafter regarding any expertise in the used jewelry business in the market locality. Notwithstanding the foregoing, West was allowed to give his opinion of the value of the ring at $2,878.00 (R.399, 5)

On cross-examination West admitted that the reason for his appraisals dictated the amount of his valuations, i.e., replacement value and value for estate appraisals and for tax purposes. (R.399, 19 through R.400, 16) West also offered the following on the question of value as determined by a willing buyer and seller:

> Nobody can say for sure what two people are going to determine what [the fair price] might be. (R.400, 21-23)

West further admitted that

> . . . the appraisals I do are based on use, usually for insurance purposes or estate value or if I need to sell this, what would it be worth if I tried to sell it and I would come back to the same level, again. (R.404, 4-7)

West further testified that his valuation of $2,878 was the **replacement value** of the allegedly stolen item, which is higher than at least the "estate value." (R.401, 5-7) On redirect (R.404, 20) West stated the **estate value** of an item was about 60% of replacement value but gave no further information on the issue of value, but of course neither related to the issue of fair market value in any event.

The appraisal Mr. West submitted as Exhibit 6-P at the trial reflected only the replacement value of the merchandise as of May 29, 1984, the date the appraisal was performed. (R.386, 17-18) At no time did the prosecutor elicit from West any opinion on the

fair market value of the merchandise on any date, much less December 15, 1983. Neither is there any evidence at all that West was familiar with the "open market" for used jewelry. He was familiar with the appraisal value of items brought to his retail store, valued for estate tax purposes and for replacement values for insurance purposes. However, there is nothing to indicate familiarity with the market in question. Furthermore, in all of the foregoing West never testified of any familiarity with any market area.

Based upon the foregoing, there simply cannot be any way whatsoever that the State complied with the requirements of Logan, supra. The only other testimony on the record relating to the issue of value is that of Defendant's witnesses Dennis Bryson and Jack Tittensor. Both knew the used jewelry market (R.352, 1 and R.375, 16-24, respectively) and both thought the fair market value of the merchandise substantially less that the State's witness, Bryson that the merchandise had a value of $700-800 (R.354, 3-4) and Tittensor a value of between a low of $650 and a high of $1,200 (R.380, 7) There is simply insufficient evidence on record to support the jury's conclusion that the property in question had a value of more than $1,000, and Defendant's

conviction for a 3d degree felony should be overturned on this ground alone.

III

CERTAIN INAPPROPRIATE COMMENTS MADE BY THE PROSECUTOR DURING CLOSING ARGUMENT REQUIRE THAT DEFENDANT'S CONVICTION BE SET ASIDE

During closing arguments in this matter on rebuttal the following conversation took place between the Court and counsel:

> MR. DAVIS: . . . I submit to you, ladies and gentlemen, there are a lot of good deals out there and that's the kind of problem you have with theft is that there's a lot of people who are in that business who buy those kinds of great deals out there and the are called fences and that's exactly what Mr. Slowe is. He is a fence. He buys that stolen property knowing he can't--
>
> MR. GUYON: Your Honor, I object. There's no testimony whatsoever on the record that Mr. Slowe is a fence.
>
> THE COURT: The Court will sustain the objection. You cannot use the word "fence."
>
> MR. DAVIS: Okay. He is then one who buys stolen property and Mr. Guyon indicated that there are people out there who look to get good deals. These are exactly the kind of deals that the police are out there to stop on the basis that these are illegal kinds of deals. These are kinds of deals you shouldn't be involved in.
>
> Additionally, it goes down there to say in the instruction No. 8, and I won't go through all of it, but I encourage you to read No. a3 and 4, No. 4, part 3 and part 4 on instruction No. 8 because is [sic] talks about the presumption that is raised by

> somebody who has already or was in the business or who has received stolen property before. There has been evidence that Mr. Slowe is that kind of an individual.
>
> MR. GUYON: Your Honor, I have to object to that. The evidence was that he had been convicted of a misdemeanor offense one time, and it is just very irritating to me to continually have him referred to as either a fence or someone who deals in this property. There has been, you know, an instance that is before the Court and that's the only evidence.
>
> THE COURT: The Court will again sustain the objection, but I have to add, there is the one instance and he does deal in this kind of property, but those have reference to different things. He does deal in used goods and part of his statement, it seems to the Court, has to do with dealing in the goods, and I think he has gone beyond it so far as using the word "fence," but obviously, there is the one conviction that was shown. (R.480, 1 through R.481, 12)

This Court has taken the position that two (2) elements are necessary to merit reversal of a conviction on the basis of comments during closing arguments amounting to prosecutorial misconduct, to-wit: (1) the remarks called to the jurors' attention matters which they would not be justified in considering in reaching a verdict and (2) under the circumstances, the jurors were probably influenced by the remarks. State v. Johnson, Utah, 663 P.2d 48, 51 (1983); State

v. Creviston, Utah, 646 P.2d 750, 754 (1982); and State v.Valdez, Utah 513 P.2d 422 (1973); and State v. Troy, Utah, 688 P.2d 483 (1984)

In Johnson at 51 the Court, although it reversed the case for other reasons, found sufficient basis for granting a new trial for the same type of misconduct that exists here. Likewise, the Court in Troy, supra, found that statements by the prosecutor in closing argument were sufficient to warrant a new trial. State v. Troy, Utah, 688 P.2d at 485-486) In Johnson the prosecutor attempted to malign defendants, ostensibly to show they merited conviction because they were bad or dishonest and not because the evidence at trial warranted conviction. With regard to what the prosecutor actually said, the Johnson Court observed at 51

> During closing argument, the prosecutor referred to William's apparent receipt of income from Hillhaven while receiving social security benefits as "double dipping." The prosecutor continued to state: "as far as I am concerned white collar crimes like this is [sic] a cancer on society." Furthermore, the prosecutor referred to Patricia's and William's signing of Daniel's Hillhaven paychecks and depositing them in their personal bank accounts as "forging of signatures." Moreover, the prosecutor made reference to Patricia's and William's filing for bankruptcy as an indication of dishonesty. The prosecutor stated that it "[d]escribes the type of person that we are dealing with."

The comments of Mr. Davis set forth above closely parallel those of the prosecutor in Johnson. There can be no real argument that the jurors' attention was called to matters they were not justified in considering. After all, the question before the jury in this case was not whether Defendant was a fence or whether Defendant ". . .[was] that kind of individual." (R.480, 23) As for the second element, it is difficult, if not impossible, to imagine the jury was not influenced against Defendant by those remarks. The word "fence" has such powerful negative connotations that no reasonable or law-abiding juror could be expected to be free from its influence. The image it conjures up of an individual habitually providing the means to every burglar for liquidating the latter's stolen merchandise is a classic example of a suggestion which cannot be undone or caused to be forgotten. If any juror had any doubt of Defendant's guilt prior to the final arguments, the comments of the prosecutor as reflected above certainly dispelled it, and such a result is impermissible. Defendant is entitled to be tried on the facts of the case, not on innuendo and name-calling, and that right was taken from him in this case because of the conduct of the prosecutor of which Defendant complains.

IV

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO SUPPRESS EVIDENCE OF DEFENDANT'S 1967 MISDEMEANOR PERJURY CONVICTION

Prior to the trial held in this matter on May 31, 1984 Defendant filed its MOTION IN LIMINE TO EXCLUDE CERTAIN EVIDENCE AND RENEWED MOTION TO QUASH SEARCH WARRANT AND TO SUPPRESS EVIDENCE (R.60-61; and R.266, 20-25) The intent of this motion was of course to convince the Court to exclude a misdemeanor conviction of Defendant for perjury in Idaho in 1967. The authority for this motion is Rule 609, Utah Rules of Evidence, hereafter "UREvid," which states in pertinent part as follows:

> **(a) General rule.** For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.
> **(b) Time limit.** Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a

> conviction more than ten years as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence. . . .

Defendant's interest in the suppression of the conviction was the fact that Defendant and the State's confidential informant John Gallegos were the only eyewitnesses to the transaction out of which the charges against Defendant arose. As Defendant's counsel explained to the Court prior to the trial,

> . . . Mr. Slowe has a misdemeanor conviction of perjury which dates back to 1967 and particularly, in these circumstances, the only really two witnesses we are going to have to the transaction in this matter, Judge, is Mr. Slowe and Mr. Gallegos, who is the State's witness and those are the only two people who know what happened in there for sure. I am in a position where if I am to put on any evidence at all, it has to come from my client and I don't think that we ought to be hampered with a perjury conviction that is 17 years old. (R.267, 1-9)

Counsel for Defendant further explained to the Court that Defendant's position was that the prejudicial effects of such evidence far outweighs any probative value the information might otherwise have had. (R.267, 10-24) The prosecutor argued against the suppression of the evidence on the basis that

> Perjury strikes it very hard whether or not someone is truthful and has the voracity[sic] of being a witness, and I think once an individual has been convicted of perjury, that that has gone beyond just the mere

> telling of falsehoods, but that is a criminal falsehood, a far greater burden placed on that individual or far greater burden on the State to show that that individual has done so. I think that still becomes relevant. (R.268, 2-11)

However, no evidence in testimony form was ever introduced and the Court refused to suppress the evidence of the 1967 conviction. (R.272, 13-22) It is Defendant's contention that the Court should have suppressed the evidence and that its failure to do so invalidates Defendant's conviction for the following reasons:

1. Rule 609(b) provides that ". . . the probative value of the conviction **supported by specific facts and circumstances substantially outweighs its prejudicial effect.** [emphasis added] In this case no specific facts and circumstances were ever proffered to the Court, much less introduced through testimony, and without such information the Court could not have made any ruling that the probative value was outweighed by its prejudicial effect.

2. The proponent of the evidence, the prosecutor, is further required by Rule 609(b) to give to Defendant

> . . . sufficient advance written notice of intent to use such evidence to provide [Defendant] with a fair opportunity to contest the use of such evidence.

No such notice was given by the State, even though the prosecutor anticipated Defendant's motion (R.269, 24 through R.270, 2) and therefore had intended all along to use the evidence of Defendant's conviction. Because of the State's noncompliance with Rule 609, UREvid. and the Court's erroneous ruling on the probative value of Defendant's misdemeanor conviction, this conviction should itself be overturned.

V

CONCLUSION

Relative to the validity of the affidavit filed in connection with the State's application for search warrant, Defendant has shown it to be wanting. To allow such a document containing misstatements, erroneous allegations and conclusions to stand as the basis for a search warrant is unthinkable. On this issue Defendant seeks the suppression of all evidence obtained in connection with the execution of the warrant and to have his conviction, which was obtained as a direct result of this illegally-obtained evidence, overturned.

Defendant seeks this Court's ruling that as a matter of law the State failed to prove that the value of the allegedly stolen merchandise was more than $1,000.00, with the result that the judgment of conviction be overturned or the crime reduced to a class A misdemeanor.

Defendant claims to have been denied a fair trial because of comments of the prosecutor during closing arguments. The fact that Defendant was referred to as a "fence" prejudiced the jury to such an extent that Defendant should be entitled to a new trial.

Lastly, Defendant seeks to have this conviction overturned on the basis that the Court refused to suppress Defendant's 1967 misdemeanor conviction for perjury. Defendant was seriously and severely prejudiced by the Court's action, and argues that the conviction was and is so remote in time as to have no probative value presently and that if it is probative that its prejudicial effect far outweighed any probative value.

DATED this 13 day of May, 1985.

PETER W. GUYON
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I hand-delivered four (4) true and correct copies of the foregoing APPELLANT'S BRIEF to David Thompson, Assistant Attorney General, 236 State Capitol, Salt Lake City, Utah 84114 this 13 day of May, 1985.

Peter W. Guyon

ADDENDUM

JUDGE OF THE CIRCUIT COURT

DEC 21 11 58 AM '83

THIRD JUDICIAL COURT
OGDEN DEPARTMENT

FILED

AFFIDAVIT FOR SEARCH WARRANT

The undersigned being first duly sworn deposes and says:

That affiant has reason to believe that

( ) on the person(s) of

(XX) on the premises known as Crazy Horse Jewelry, 2470 Washington,

( ) in the vehicle(s) described as

in the City of Ogden, County of Weber, State of Utah, there is now certain property or evidence described as:

RING Ladies' diamond ring, one 1/2 ct. diamond, six 10 point diamonds, four 4 point diamonds, two 12 point diamonds, two 8 point diamonds, set in three white gold settings, soldered together

and that said property or evidence

(XX) was unlawfully acquired or is unlawfully possessed.
( ) has been used or is possessed with the purpose of being used to commit or conceal the commission of an offense.
( ) is evidence of illegal conduct.

The facts establishing the grounds for issuance of a Search Warrant are:

On 12-15-83, police agent John GALLEGOS entered the business of Crazy Horse Jewelry, 2470 Washington, and sold the above-listed ring to Russell SLOWE, Sr. At the time of the transaction, Slowe was told by John Gallegos that the ring is stolen and that he needed some quick cash. Slowe purchased the ring, believing it was stolen, and the ring is currently in the business at this time. These acts were recorded on tape and observed by affiant and other police officers nearby.

Further grounds for issuance of a Search Warrant are attached hereto and are incorporated herein. (See attachment(s) _____)

White - Court Copy

Your affiant considers the information received from the confidential informant reliable because: Gallegos has assisted police officers on prior occasions, resulting in the clearance of more than 25 burglaries, and several felony arrests and convictions.

The following information corroborates the facts given by the confidential informant: Police officers recorded the conversation by use of a tape recorder and had constant view of the store and on-sight view of our informant.

WHEREFORE, the affiant prays that a Search Warrant be issued for the seizure of said items

(XX in the daytime,
( ) at any time day or night because there is reason to believe it is necessary to seize the property prior to it being concealed, destroyed, damaged, altered, or for other good reasons as follows:

It is further requested that the officer executing the requested warrant not be required to give notice of his authority or purpose because

( ) the property sought may be quickly destroyed, disposed of, or secreted.
( ) physical harm may result to any person if notice were given. This danger is believed to exist because:

AFFIANT

Detective, Ogden City Police Department
TITLE

Subscribed and sworn to before me this 15th day of December, 1983.

JUDGE

WEBER COUNTY, STATE OF UTAH

S E A R C H W A R R A N T

TO ANY PEACE OFFICER IN THE STATE OF UTAH:

Proof by affidavit under oath having been made this day before me by Detective Jeff Cottam, I am satisfied that there is probable cause to believe that

( ) on the person(s) of

(XX) on the premises known as Crazy Horse Jewelry, 2470 Washington,

( ) in the vehicle(s) described as

in the City of Ogden, County of Weber, State of Utah, there is now being possessed or concealed certain property or evidence described as:

RING Ladies' diamond ring consisting of one .50 ct. diamond, six 10 point diamonds, four 4 point diamonds, two 12 point diamonds, two 8 point diamonds in three white gold settings soldered together.

which property or evidence

(XX) was unlawfully acquired or is unlawfully possessed.
( ) has been used or is possessed with the purpose of being used to commit or conceal the commission of an offense.
( ) is evidence of illegal conduct

YOU ARE THEREFORE COMMANDED:

(XX) in the daytime
( ) at any time day or night
( ) to execute without notice of authority or purpose

to make a search of the above-named or described person(s), premises, and vehicle(s) for the herein above-described property or evidence and if you find the same or any part thereof, to bring it forthwith before me at the Circuit Court, County of Weber, State of Utah, or retain such propert in your custody, subject to the order of this court.

Given under my hand and dated this 15th day of December, 1983.

JUDGE

White - Court Copy
Yellow - Officer's Copy
Pink - To be left at Scene of Search

COURT OF WEBER COUNTY. STATE OF UTAH

STATE OF UTAH.	*	JOHN F. WAHLQUIST. Judge
Plaintiff.	*	Case No. 15841
VS.	*	Date: April 30 1984
RUSSELL G. SLOWE. SR.,	*	Dean Olsen. Reporter
Defendant.	*	D. C. D., Court Clerk

This is the time set for Defendant's Motion to Quash Search Warrant and to Surpress Evidence and for Return of Seized Property; and Defendant's Motion in Limine to Surpress Certain Evidence; and Defendant's Motion to Dismiss.

State was represented by Christopher G DAvis. Esq.

Defendant was present and represented by attorney Peter W. Guyon. Esq.

Argument by counsel.

Off Jeff M. Cottum sworn and testified. Cross.

John L. Gallegos sworn and testified.

Further argument by counsel.

DEFENDANT RESTS BOTH SIDES REST.

Findings of fact by the Court The Court denied all of the above motions. The case is to proceed to trial as set.

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT

COUNTY OF WEBER, STATE OF UTAH

STATE OF UTAH,	)	
Plaintiff,	)	VERDICT
vs.	)	
RUSSELL GEORGE SLOWE,	)	Case No. 15841
Defendant.	)	

We, the jury impaneled to try the issues in the above-entitled matter, do hereby find the defendant GUILTY of the offense of ATTEMPTED THEFT, a third degree felony.

DATED this 1st day of June, 1984.

Richard L. Sciarini
FOREMAN

IN THE DISTRICT COURT OF WEBER COUNTY, STATE OF UTAH

STATE OF UTAH	*	JOHN F. WAHLQUIST. Judge
Plaintiff.	*	Case No. 15841
vs.	*	Date: June 20 1984
RUSSELL G. SLOWE. JR.,	*	NANCY DAVIS- Reporter
Defendant-	*	D. C. D., Court Clerk

JUDGE DOUGLAS L. CORNABY PRESIDING FOR JUDGE JOHN F. WAHLQUIST

This is the time set for Sentence.

Charge: ATTEMPTED THEFT, a Third Degree Felony

State was represented by Christopher G. Davis, Esq.

Defendant was present and represented by attorney Peter Guyon, Esq.

Defense counsel files a Motion for New Trial and a Motion for Judgment Notwithstanding theVerdict. Argument by counsel on motions. The Court denied the motions. Defense counsel makes a motion for Probable Cause. Denied.

It was the judgment of the Court and the sentence of law that the defendant serve a term in the Utah State Prison of NOT TO EXCEED FIVE (5) YEARS The Court stayed the sentence.

Report and Imposition of Sentence set for November 27, 1984, at 2:00 p.m.. and in the meantime the defendant was placed on probation with the Adult Probation Department.

TERMS OF PROBATION: 1. The defendant is to serve SIX (6) MONTHS in the Weber County Jail. with 5 days good time per month only. and the sentence is to be reviewed on the above report date. 2. Defendant is not to violate any laws. 3. Any other terms the Adult Probation Department desires to impose.

The defendant is to report to the jail on Wednesday, June 27. 1984. at 9:00 a.m.